

ARKANSAS SUPREME COURT

No. CR 06-1174

NOT DESIGNATED FOR PUBLICATION

THOMAS ADAMS, JR.
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered November 30, 2006

PRO SE MOTIONS TO PROCEED IN
CIRCUIT COURT UNDER ARK. R.
CRIM. P. 37.1, FOR ACCESS TO
TRANSCRIPT, TO PROCEED *IN*
FORMA PAUPERIS, TO EXPEDITE
MOTIONS, AND TO STAY APPEAL
[CIRCUIT COURT OF PULASKI
COUNTY, CR 2004-5063, HON. JOHN
W. LANGSTON, JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT.

PER CURIAM

A jury found appellant Thomas Adams, Jr., guilty of first-degree battery and sentenced him as a habitual offender to 360 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment. *Adams v. State*, CACR 05-1186 (Ark. App. Apr. 19, 2006). Appellant timely filed in the trial court a petition for postconviction relief under Ark. R. Crim. P. 37.1, which was denied without a hearing. Appellant has lodged an appeal of that order in this court and is proceeding *pro se*. He now brings the instant motions to proceed in circuit court under Rule 37.1, for access to transcript, to proceed *in forma pauperis*, to expedite motions and to stay appeal.

This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Seaton v. State*, 324

Ark. 236, 920 S.W.2d 13 (1996); *Harris v. State*, 318 Ark. 599, 887 S.W.2d 514 (1994); *Reed v. State*, 317 Ark. 286, 878 S.W.2d 376 (1994); *see Chambers v. State*, 304 Ark. 663, 803 S.W.2d 932 (1991); *Johnson v. State*, 303 Ark. 560, 798 S.W.2d 108 (1990); *Williams v. State*, 293 Ark. 73, 732 S.W.2d 456 (1987). Here, it is clear on the record before us that appellant could not prevail.

In his petition, appellant presented arguments as follows: (1) that the injuries to the victim were justified as self-defense; (2) that his attorney failed to adequately argue a self-defense theory at trial; (3) that certain statements by the prosecution at trial were inappropriate and denied appellant a fair trial; (4) that trial counsel failed to adequately present an alternate theory concerning the events; (5) that trial counsel failed to present an opening statement. In its order denying postconviction relief, the trial court examined each claim and determined that appellant's petition was without merit because none of those claims supported a basis for relief under Rule 37.1.

This court does not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there is evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002). We cannot say that the trial court was clearly erroneous in determining that appellant's petition did not contain meritorious claims for postconviction relief under Rule 37.1.

Appellant's first claim, in which he asserts that he is innocent and that the injuries were self-defense, is in essence a challenge to the sufficiency of the evidence to support the verdict.¹

¹ The claims in appellant's petition are difficult to discern because appellant failed to comply with the requirements in Rule 37.1(b) concerning margins. We have, however, in this case, elected not to dismiss the petition on that basis. While not all of the language is legible, we

Allegations of actual innocence and other challenges to sufficiency of the evidence are direct attacks on the verdict and not claims cognizable in a Rule 37.1 proceeding. We do not permit an appellant to rechallenge the sufficiency of the evidence at trial in a postconviction proceeding. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

Appellant's third claim, that he was denied a fair trial because the prosecution presented arguments to the jury concerning appellant's anger and problems with his ex-wife and the victim, also fails to present a claim cognizable in a Rule 37.1 proceeding. This court has held that even constitutional issues must be raised at trial or on direct appeal, rather than in postconviction relief proceedings. *Williams v. State*, 346 Ark 54, 56 S.W.3d 360 (2001). We have made an exception to the rule in those cases where the errors are so fundamental as to render the judgment of conviction void and subject to collateral attack. *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999) (*per curiam*); see also *Kemp v. State*, 330 Ark. 757, 956 S.W.2d 860 (1997) (*per curiam*). The claims appellant raised concerning the prosecutor's statements are simply not such fundamental error. Any question concerning whether this type of statement was appropriate should have been raised at trial to be addressed.

Appellant's remaining issues assert ineffective assistance of counsel. In an appeal from a trial court's denial of postconviction relief on a claim of ineffective assistance of counsel, the question presented is whether, based on the totality of the evidence, the trial court clearly erred in holding that counsel's performance was not ineffective under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). The

can determine that appellant's arguments are as characterized and that they do not satisfy the requirements to state a claim under Rule 37.1.

claimant must show first that counsel's performance was deficient, with errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and claimant must also show that this deficient performance prejudiced his defense through a showing that petitioner was deprived of a fair trial. *Weatherford v. State*, 363 Ark. 579, ___ S.W.3d ___ (2005) (*per curiam*).

A defendant must first show that counsel's performance fell below an objective standard of reasonableness and then that counsel's errors actually had an adverse affect on the defense. *Burton v. State*, ___ Ark. ___, ___ S.W.3d ___ (Ark. June 29, 2006). In our review, this court indulges in a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.* The defendant claiming ineffective assistance of counsel has the burden of overcoming that presumption by identifying the acts and omissions of counsel which, when viewed from counsel's perspective at the time of trial, could not have been the result of reasonable professional judgment. *Id.* The petitioner must show that, but for counsel's errors, the fact-finder would have had a reasonable doubt respecting guilt and that the decision reached would have been different absent the errors. *Id.*

Appellant first asserted that counsel failed to adequately present a self-defense argument and next asserted that counsel did not adequately present an alternate theory for the events. The claims in appellant's petition do not identify any specific alternate theory, aside from the theory of self-defense that was presented by counsel, or what specific evidence might have been introduced to bolster the argument of self-defense, aside from appellant's claim that there was no record of any injury inflicted by him upon his wife. Appellant's claims clearly were not adequate to overcome the presumption of reasonable professional assistance, or to make a showing of prejudice resulting from

the asserted errors.

Appellant's last claim asserted ineffective assistance as a result of trial counsel's failure to present an opening statement. Counsel is allowed great leeway in making strategic and tactical decisions. Those decisions are a matter of professional judgment, and matters of trial tactics and strategy are not grounds for postconviction relief on the basis of ineffective assistance of counsel. *Rankin v. State*, 365 Ark. 255, ___ S.W.3d ___ (2006). Counsel's strategic decisions must still be supported by reasonable professional judgment. *Weatherford*, 363 Ark. at ___, ___ S.W.3d at ___. The decision as to whether to present an opening statement is clearly one that is tactical. Appellant's petition did not present any facts to show how this decision might have prejudiced his defense or could not have been the result of reasonable professional judgment.

Appellant clearly failed to present facts in his petition so as to carry his burden of proof. Because he did not present meritorious claims that would support a finding by the trial court granting relief under Rule 37.1, it is clear that appellant could not prevail on appeal. Accordingly, we dismiss the appeal and the motions are moot.

Appeal dismissed; motions moot.

Glaze, J., not participating.